

HOUSE OF LORDS

Delegated Powers and Regulatory Reform  
Committee

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14th Report of Session 2016–17

**Commonwealth Development  
Corporation Bill**

**High Speed Rail (London – West  
Midlands) Bill: Government Response**

**Policing and Crime Bill:  
Government Response**

**Abortion (Disability Equality) Bill [HL]**

**Strathclyde Review: Further  
correspondence**

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### *The Delegated Powers and Regulatory Reform Committee*

The Committee is appointed by the House of Lords each session and has the following terms of reference:

- (i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;
- (ii) To report on documents and draft orders laid before Parliament under or by virtue of:
  - (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
  - (b) section 7(2) or section 19 of the Localism Act 2011, or
  - (c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

- (iii) To report on documents and draft orders laid before Parliament under or by virtue of:
  - (a) section 85 of the Northern Ireland Act 1998,
  - (b) section 17 of the Local Government Act 1999,
  - (c) section 9 of the Local Government Act 2000,
  - (d) section 98 of the Local Government Act 2003, or
  - (e) section 102 of the Local Transport Act 2008.

### *Membership*

The members of the Delegated Powers and Regulatory Reform Committee are:

Baroness Drake	Lord Lisvane
Baroness Fookes ( <i>Chairman</i> )	Lord Moynihan
Lord Flight	Lord Thomas of Gresford
Baroness Gould of Potternewton	Lord Thurlow
Lord Jones	Lord Tyler

### *Registered Interests*

Committee Members' registered interests may be examined in the online Register of Lords' Interests at [www.publications.parliament.uk/pa/ld/ldreg.htm](http://www.publications.parliament.uk/pa/ld/ldreg.htm). The Register may also be inspected in the Parliamentary Archives.

### *Publications*

The Committee's reports are published by Order of the House in hard copy and on the internet at [www.parliament.uk/hldprcpublications](http://www.parliament.uk/hldprcpublications).

### *General Information*

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### *Contacts for the Delegated Powers and Regulatory Reform Committee*

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103 and the fax number is 020 7219 2571. The Committee's email address is [hldelegatedpowers@parliament.uk](mailto:hldelegatedpowers@parliament.uk).

### *Historical Note*

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

# Fourteenth Report

## COMMONWEALTH DEVELOPMENT CORPORATION BILL

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1. This Money Bill had its First Reading on 11 January and has two purposes.
  - First, to increase from £1.5 billion to £6 billion the amount of financial assistance that the government can provide to the CDC Group plc (“CDC”), a wholly-owned government company, and its associated companies.
  - Second, to give a delegated power to the Secretary of State, by affirmative statutory instrument approved by the House of Commons, to raise the new £6 billion limit to £12 billion. The Department for International Development has provided a memorandum on this delegated power.
2. The Department justifies the power on two grounds. First, it is more appropriate to have a delegated power than to require each subsequent increase to be made by primary legislation. Second, it provides the necessary flexibility.
3. We take the view that neither ground is a reason but rather an assertion that requires justification. The current limit of £1.5 billion was set by Act of Parliament in 1999 and it took until 2015 before it was reached. The Bill quadruples the current limit to £6 billion. The Department has not provided a convincing, or indeed any, explanation why the Secretary of State also needs the power to double it again to £12 billion. Not only is the proposed limit eight times the current limit but it introduces a delegated power into an Act whose financial assistance limit worked satisfactorily for 16 years without the need for any amendment, let alone amendment by a Henry VIII power.
4. As for the argument that a delegation of power provides flexibility, we accept that an affirmative statutory instrument provides more flexibility to the government than does a Bill. But that would be an argument for generally displacing Bills by affirmative statutory instruments, an argument that we do not find attractive and which is unlikely to persuade the House. We have previously been critical of government justifying delegation on grounds of “flexibility” without properly explaining why this is considered appropriate.<sup>1</sup>
5. The Department notes that there used to exist a statutory uprating mechanism, enabling the old limit of £750 million to be raised to £850 million by affirmative statutory instrument. However this facility was abolished in 1999, since when the existing statutory limit of £1.5 billion has not been amendable by statutory instrument.
6. **We consider that the Bill contains an inappropriate delegation of power unless the Government can provide a convincing explanation of the need for this Henry VIII power.**

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<sup>1</sup> See for example: Delegated Powers and Regulatory Reform Committee, (21st Report, Session 2015–16, [HL Paper 98](#)) para. 11.

### **HIGH SPEED RAIL (LONDON – WEST MIDLANDS) BILL: GOVERNMENT RESPONSE**

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7. We considered this Bill in our 7th Report of this Session.<sup>2</sup> The Government have now responded by way of a letter from Andrew Jones MP, Parliamentary Under Secretary of State at the Department for Transport, printed at Appendix 1.

### **POLICING AND CRIME BILL: GOVERNMENT RESPONSE**

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8. We considered the Government Amendments to this Bill in our 8th Report of this Session.<sup>3</sup> The Government have now responded by way of a letter from Baroness Williams of Trafford, Minister of State at the Home Office, printed at Appendix 2.

### **ABORTION (DISABILITY EQUALITY) BILL [HL]**

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9. There is nothing in this Bill which we would wish to draw to the attention of the House.

### **STRATHCLYDE REVIEW: FURTHER CORRESPONDENCE**

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10. Following the publication of the report titled “*Government Response to the Strathclyde Review: Secondary legislation and the primacy of the House of Commons*”,<sup>4</sup> the Rt Hon. David Lidington MP, Leader of the House of Commons, wrote to the Constitution Committee, the Delegated Powers and Regulatory Reform Committee and the Secondary Legislation Scrutiny Committee regarding their reports on the Strathclyde Review. In reply, the three Lords’ Committees sent a joint letter to Mr Lidington.<sup>5</sup> We have now received a response to the joint letter which is printed at Appendix 3.

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2 Delegated Powers and Regulatory Reform Committee (7th Report, Session 2016–17, [HL Paper 66](#)).

3 Delegated Powers and Regulatory Reform Committee (8th Report, Session 2016–17, [HL Paper 73](#)).

4 HM Government, *Government Response to the Strathclyde Review: Secondary legislation and the primacy of the House of Commons*, Cm 9363, December 2016: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/573767/government\\_response\\_to\\_the\\_strathclyde\\_review\\_december\\_2016\\_web\\_version.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/573767/government_response_to_the_strathclyde_review_december_2016_web_version.pdf) [accessed 18 January 2017]

5 Secondary Legislation Scrutiny Committee (19th Report, Session 2016–17, [HL Paper 90](#))

## APPENDIX 1: HIGH SPEED RAIL (LONDON – WEST MIDLANDS) BILL: GOVERNMENT RESPONSE

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### Letter from Andrew Jones MP, Parliamentary Under Secretary of State at the Department for Transport, to Baroness Fookes, Chairman of the Delegated Powers and Regulatory Reform Committee

The report raised an issue relating to Clause 53(10) of the Bill.

#### *Clause 53(10)(a)*

Clause 53 introduces a right of entry to undertake surveys and environmental studies within 500m of proposed future high speed rail projects intended to be promoted via a hybrid Bill. Clause 53(10)(a) allows that 500m distance to be amended in all cases. Your Committee's report concludes that the Government has not made the case for the power in Clause 53(10)(a) and recommend that, unless we do so, it should be removed from the Bill. I am happy to provide further justification for this power. In order to develop the design of a high speed railway and undertake the environmental studies required to comply with the Standing Orders that apply to a hybrid Bill it is necessary to access land. Such rights of entry already exist for projects seeking development consent under the Planning Act 2008 and for organisations authorised to promote compulsory purchase orders under the Housing and Planning Act 2016, but no such power currently exists for hybrid Bills. In developing the High Speed Rail (London–West Midlands) Bill there have been substantial issues gaining access to land, a fact for which HS2 Ltd has been criticised during the passage of this Bill.

Clause 53 introduces a right of entry for future hybrid Bills promoted by a hybrid Bill. Unlike right of entry powers under the Planning Act 2008 or the Housing and Planning Act 2016, it imposes a geographical limit to this right of entry of within 500m of the line of route. Given the scale of high speed rail developments it was considered that a geographic limit was required to reassure the public and 500m was considered to represent a sensible distance based on current environmental practice. The power to amend this distance by Statutory Instrument was also included at clause 53(10). Given that this right of entry power is for all future high speed railways it needs to be adaptable to changing approaches in the future. The current distance of 500m is based on current environmental practice. However, this is a constantly evolving field and environmental practice is likely to change in the future. Such a change could include best practice evolving to require baseline surveys over a wider area for species, water quality or biodiversity. Clause 53(10)(a) is designed to deal with such a general change in surveying practice. Clause 53(10)(b) would not apply as such a change would relate to all classes, not a particular issue in a particular geography.

Clearly it is difficult to predict how best practice will evolve over time but the Government's view is that it is prudent and necessary to include such a power. In the absence of such a power any change in best practice would require a change in primary legislation. There is no guarantee that there would be a suitable legislative vehicle to allow such a change to be made to address the needs of a future high speed rail hybrid Bill. This would leave such a project in the same situation as HS2 Phase One, being criticised for being unable to deliver current best practice. The affirmative resolution procedure for such a change ensures that the change needs to be necessary and fully justified. I hope this explains the importance of this legislation being future-proofed and you agree that the power proposed at clause 53(10)(a) provides the right balance between future-proofing and protecting people's personal interests.

*De-hybridising provision*

Your report also brings the House's attention to the de-hybridising provision that relates to clause 53(10)(a). I thought it would be useful to outline why we believe this provision is required. While I agree that exercising clause 53(10)(a) is unlikely to be hybridising, we believe that it will be useful for the House, promoters and potentially affected parties for the situation to be clear. In all likelihood the power in clause 53(10)(a) is only likely to be exercised when there has been a general change in environmental practice and there is a high speed railway being proposed. Therefore, in such circumstances those landowners affected by the proposed railway are likely to consider themselves specially and directly affected by any amendment proposed under clause 53(10)(a).

By including the de-hybridising provision now it clarifies the issue for the House. As set out in delegated powers memorandum, in these circumstances the Government would engage with those landowners that felt themselves affected to discuss the impacts of the change. This engagement would include an explanation of the significant safeguards that exist around the use of this power including the need to take all reasonable steps to agree access first and the need for warrants to access residential properties. The absence of a de-hybridising provision risks significant delay to the exercise of this power, which could ultimately frustrate the purpose for which it is intended.

I hope this information provides clarity on the Government's position regarding clause 53(10)(a).

**17 January 2017**

## APPENDIX 2: POLICING AND CRIME BILL: GOVERNMENT RESPONSE

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### Letter from Baroness Williams of Trafford, Minister of State at the Home Office, to Baroness Fookes, Chairman to the Delegated Powers and Regulatory Reform Committee

I am grateful to the Delegated Powers and Regulatory Report Committee for its consideration of the Government's Report stage amendments to the Policing and Crime Bill. I apologise that due to an oversight the Department's supplementary memorandum did not address the regulation-making power in what is now clause 163 of the Bill, as amended on Report. I have carefully considered the Committee's recommendation in respect of that power and set out the Government's response below.

As the Committee notes, the regulation-making power in clause 163 will enable the Government to pilot the provisions in clause 161 and 162 of the Bill, which confer powers on police and immigration officers to require a suspected foreign national to state their nationality and provide their nationality document(s) on request, for the purposes of assessing the effectiveness of the provisions. The power to pilot these provisions was brought forward in response to the concerns expressed by the Joint Committee on Human Rights, and during the Committee stage debate on the Bill, about the potential disproportionate impact of the new powers in clauses 161 and 162 on black and ethnic minority nationals. It is the Government's view that the regulation-making power in clause 163 is, in essence, a commencement power and consequently is not on a par with that contained in what is now section 161 of the Housing and Planning Act 2016 which conferred a power to pilot alternative arrangements for determining applications for planning permission. In response to the Committee's report on the Housing and Planning Bill, the Government accepted that the pilots provided for in that Bill represent a significant change to the planning system and, as such, in that particular instance justified the application of the affirmative procedure to the first exercise of the power.

As a commencement power, the Government considers that section 33 of the Crime and Security Act 2010 offers a closer analogy. That section provided for the piloting of the provisions in sections 24 to 32 of that Act which make provision for domestic violence protection notices and domestic violence protection orders. In common with the standard practice for commencement powers, orders made under section 33 of the 2010 Act are not subject to Parliamentary scrutiny (on the grounds that Parliament has already approved the provisions by enacting them); the Government considers that the same considerations apply here.

At Report stage (Official Report, 12 December 2016, columns 1012–1013), Baroness Chisholm gave an undertaking that regulations made under clause 163 would specify the duration of any pilot and that, before the wider commencement of these provisions, the Government would lay a report before Parliament on the outcome and effectiveness of the pilot.

For these reasons, and in view of the undertakings given at Report stage, the Government is not persuaded that amendments to clause 163 along the lines proposed by the Committee are necessary.

**11 January 2017**

### APPENDIX 3: STRATHCLYDE REVIEW: FURTHER CORRESPONDENCE

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#### Letter from Rt Hon. David Lidington MP, Leader of the House of Commons, to Baroness Fookes, Chairman to the Delegated Powers and Regulatory Reform Committee

Thank you for your joint letter of 19 December regarding the Government's response to the Strathclyde and related Select Committee reports (Cm 9363).

I would emphasise that the Government's position has remained unchanged throughout this process. Our aim has always been to try to strike the right balance between recognising and upholding the vital role the House of Lords plays in scrutinising legislation and ensuring that the elected House has the final say. We recognise that the House of Lords is highly effective in its scrutiny of statutory instruments and the exercise of other delegated powers. But as I said in the House of Commons on 17 November, we also note that there is no mechanism for the elected House to have the final say when they are considered, and agree with Lord Strathclyde's conclusion that on statutory instruments, as with primary legislation, the will of the elected House should prevail. However, the Government does not intend to introduce legislation at this time.

As the Leader of the Lords set out in her Statement on 17 November, the Government are therefore reliant on the discipline and self-regulation that the Lords imposes upon itself. As she also made clear, we are pleased that the House of Lords has clearly signalled the importance of working constructively together in a spirit of partnership in scrutinising the legislative programme. Yet were that to break down, we would have to reflect on our decision. Both the Leader of the Lords and I are of one mind on this issue.

I would like to once again welcome the thorough and reflective consideration given to Lord Strathclyde's recommendations by your committees. The Government agrees that an appropriate balance should be struck between the legislative content of primary versus secondary legislation, which is why there are robust processes in place within Government to consider which powers should be delegated. Within Government, before any Bill is introduced to Parliament or published in draft, the Parliamentary Business and Legislation Cabinet sub-committee must first have considered the nature of the delegated powers, whether the powers are appropriate and are subject to the right level of parliamentary oversight. Once a Bill is introduced in the Lords, we take the scrutiny performed by the Delegated Powers and Regulatory Reform Committee very seriously, providing a delegated powers memorandum in each case, and implementing the recommendations made by the Delegated Powers and Regulatory Reform Committee in the majority of cases. That, combined with the scrutiny that the Joint Committee on Statutory Instruments and Secondary Legislation Scrutiny Committee perform when the actual statutory instruments are laid after Royal Assent, mean that there is a rigorous framework in place to scrutinise and challenge the delegation of powers to Ministers at every stage. This is in addition to the broader legislative scrutiny applied by committees such as the Constitution Committee.

Finally, the Government does not agree with the assessment that, when asking Lord Strathclyde to undertake this review, its remit was erroneously set. In both cases, primary and secondary legislation is put before both Houses for their consent, and in both cases we believe that it should be the elected House that is able to have the final say.

**12 January 2017**

## **APPENDIX 4: MEMBERS AND DECLARATIONS OF INTERESTS**

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Committee Members' registered interests may be examined in the online Register of Lords' Interests at [www.publications.parliament.uk/pa/ld/ldreg.htm](http://www.publications.parliament.uk/pa/ld/ldreg.htm). The Register may also be inspected in the House of Lords Record Office.

For the business taken at the meeting on 18 January 2017 Members declared no interests.

### **Attendance**

The meeting on the 18 January 2017 was attended by Baroness Drake, Baroness Fookes, Baroness Gould of Potternewton, Lord Jones, Lord Thomas of Gresford, Lord Thurlow and Lord Tyler.